

Before the
Federal Communications Commission
Washington, D.C. 20554

ORIGINAL

In the Matter of)
)
Federal-State Joint Board on)
Universal Service)
)
NPCR, Inc. d/b/a Nextel Partners)
)
)
Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Alabama)
)
Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Florida)
)
Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Georgia)
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Petition for Designation as an)
Eligible Telecommunications Carrier)
in the Commonwealth of Pennsylvania)
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Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of Tennessee)
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Petition for Designation as an)
Eligible Telecommunications Carrier)
in the Commonwealth of Virginia)
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Federal-State Joint Board on)
Universal Service)
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Nextel Partners of Upstate New York, Inc.)
d/b/a Nextel Partners)
)
)
Petition for Designation as an)
Eligible Telecommunications Carrier)
in the state of New York)

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To: The Commission

NEXTEL PARTNERS' OPPOSITION TO APPLICATION FOR REVIEW

NPCR, Inc. and Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners (hereinafter, collectively, "Nextel Partners")¹, by the undersigned attorneys, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, hereby file this Opposition to the Application For Review ("Application") of the Rural Local Exchange Carriers ("Rural LECs")² with regard to the Order of the Wireline Competition Bureau (the "Bureau") in the above-captioned proceeding.³ The Bureau's Order designated Nextel Partners as an eligible telecommunications carrier ("ETC") in requested service areas in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia, pursuant to section 214(e)(6) of the Communications Act ("the Act"), 47 U.S.C. §214(e)(6).⁴ As set forth below, the Application is without merit and should be denied.

DISCUSSION

In concluding that a grant of Nextel Partners' ETC petitions was in the public interest,⁵ the Bureau applied the *Virginia Cellular* standard recently adopted by the Commission for

¹ NPCR, Inc. and Nextel Partners of Upstate New York, Inc. are wholly owned indirect subsidiaries of Nextel Partners, Inc., and function as the operating entities of the Nextel Partners digital wireless system.

² Application For Review of TDS Telecommunications Corp. et. al, filed September 24, 2004.

³ *Federal-State Joint Board on Universal Service, NPCR, Inc. d/b/a Nextel Partners Petitions For Designation as an Eligible Telecommunications Carrier in the States of Alabama, Florida, Georgia, Pennsylvania, Tennessee, and Virginia, Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners Petition For Designation as an eligible Telecommunications Carrier in the State of New York*, CC Docket No. 96-45, DA 04-2667 (rel. August 25, 2004) ("Order"), amended by *Erratum* released September 13, 2004.

⁴ In its Order the Bureau designated Nextel Partners as an ETC in the requested service areas in Alabama, Florida, Georgia, New York, Tennessee, and Virginia served by non-rural telephone companies. In addition, the Bureau's Order designated Nextel Partners as an ETC in the requested service areas in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia served by rural telephone companies.

⁵ *Order*, at ¶¶16-17.

evaluation of ETC petitions.⁶ The Bureau's decision was the result of a rigorous process spanning almost one and one-half years in which numerous parties, including members of the Rural LECs, participated.⁷ After a full review of the record, the Bureau concluded that the universal service offerings of Nextel Partners, a nationwide wireless carrier with a particular interest in serving the rural and insular areas of the nation with state-of-the-art digital technology, "will provide benefits to rural consumers."⁸ The Bureau specifically recognized the importance of mobility to rural citizens noting that, "the mobility of Nextel's wireless service will provide benefits such as access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities."⁹ The Order also recognized the benefits of consumer choice and the likelihood that Nextel Partners' local calling areas, which are larger than those of the incumbent LECs that it competes against, could result in fewer toll charges for rural citizens.¹⁰

The Rural LECs do not challenge any of the substantive findings set forth in the Bureau's Order, nor do they dispute that the Bureau's Order granting Nextel Partners' petitions is fully in accord with the Commission's *Virginia Cellular* standard. Rather, the Rural LECs seek review of the Order in this proceeding based *solely* on the ground that they do not concur with the *Virginia Cellular* standard and prefer that it not be applied at all. The Rural LECs request

⁶ *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition For Designation as an Eligible Telecommunications Carrier for the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular*").

⁷ See *Order* at n.1 and Appendix A.

⁸ *Order*, at ¶15.

⁹ *Order*, at ¶18; *Also see Virginia Cellular*, 19 FCC Rcd at 1576, ¶29, where the Commission recognized the importance of mobility to rural citizens.

¹⁰ *Order*, at ¶18.

instead that Nextel Partners' designation be reversed and that consideration of *all* ETC petitions be suspended until after the Commission resolves a number of universal service policy issues in other proceedings.¹¹ In adopting the *Virginia Cellular* standard, the Commission rejected this very argument, and set up a well-considered policy and process for consideration of ETC petitions to go forward. In their Application, the Rural LECs present no legitimate reason to reverse the Commission's carefully balanced decision. Accordingly, the Application should be denied and the Commission should affirm the Bureau's Order granting ETC designation to Nextel Partners.

I. The Virginia Cellular Standard Was Designed For Consideration Of Competitive ETC Applications And Cannot Be Ignored.

The Rural LECs acknowledge that the Commission's *Virginia Cellular Order* sets forth the requirements that a petitioner must satisfy in order to be granted ETC status.¹² Although the Rural LECs advance no substantive argument that Nextel Partners fails to meet these requirements, they nevertheless contend that the Commission should ignore the current law and reverse the grant of ETC designation to Nextel Partners. This self-serving position is contrary to law and will harm the public interest by depriving rural citizens of the benefits of consumer choice and mobility and should be rejected.

In establishing the *Virginia Cellular* standard, the Commission was well aware of the pending policy issues relating to ETC designations and growth of the universal service fund advanced by the Rural LECs in the Application.¹³ After careful review, the Commission

¹¹ *Application*, at pp. i-ii.; *See Federal-State Joint Board on Unoversal Service, CC Docket No.96-45, FCC 04-127*, Notice of Proposed Rulemaking (rel. June 8, 2004); *Federal-State Joint Board on Universal Service, CC Docket No.96-45, FCC 04J-1*, Recommended Decision, (rel. February 27, 2004) (*Recommended Decision*).

¹² *Application*, at p.4.

¹³ *Virginia Cellular Order* at ¶3; *See Application*, at pp. 7-11.

determined that further delay in the consideration of ETC petitions was not in the public interest. Balancing the importance of moving to decision on pending ETC petitions with the unresolved policy issues the Commission held, “[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission.”¹⁴

In adopting the *Virginia Cellular* standard for review of pending ETC petitions, the Commission noted that “the outcome of the Commission’s pending proceeding before the Joint Board examining the rules relating to high-cost universal service support in competitive areas could potentially impact the support ... ETCs may receive in the future” and emphasized that the *Virginia Cellular* Order “is not intended to prejudge the outcome of that proceeding.”¹⁵ Thus, it is clear that in the *Virginia Cellular* decision the Commission adopted standards that allow it to move forward to decision on pending ETC petitions, while acknowledging that those standards are subject to amendment by future Commission orders in the Joint Board proceeding.

Now, barely eight months after the release of the *Virginia Cellular* decision, and without any change in the universal service rules, the Rural LECs ask that the Commission simply ignore the established standards and suspend consideration of all ETC petitions. This argument is contrary to law and policy and should be rejected.

II. The Commission Should Deny The Application And Affirm The Bureau’s Order Granting ETC Designation To Nextel Partners.

Under Section 214 (e) (6) of the Act, 47 U.S.C. § 214(e)(6), the Commission has a mandate from Congress to act on ETC designation petitions filed by competitive carriers, such as Nextel Partners, where a state declines to accept jurisdiction. Recognizing this mandate, the Commission acknowledged in the *Twelfth Report and Order* in CC Docket 96-45 that “indefinite

¹⁴ *Virginia Cellular Order* at ¶ 4.

¹⁵ *Id.*, at ¶ 12

delays in the designation process will thwart the intent of Congress” to promote universal service in high-cost areas.¹⁶ Finding that “excessive delay” in the consideration of these petitions could “hinder the development of competition and the availability of service in many high-cost areas” the Commission committed to resolve ETC petitions within a six month time frame.¹⁷ The *Virginia Cellular Order* allowed the Commission to move forward with its statutory obligation for review of ETC petitions, including those of Nextel Partners, which had been awaiting consideration for substantially longer than six months.

Following adoption of the *Virginia Cellular* standards, Nextel Partners supplemented its petitions to comply with those standards, and interested parties, including the Rural LECs, had an opportunity to respond.¹⁸ It was only after all responses, comments and supplemental responses were made that the Bureau designated Nextel Partners as an ETC in accordance with the *Virginia Cellular* standards based on the entire record developed over one and one-half years.

Under well-established legal principles the Commission is bound to abide by its existing rules and policies.¹⁹ In this case, as established in the Bureau’s Order, the record clearly demonstrates that Nextel Partners meets the applicable standards of *Virginia Cellular*. Indeed, the Rural LECs have not even attempted to raise challenges to the substantive determination of

¹⁶ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, at ¶114 (2000) (“*Twelfth Report and Order*”).

¹⁷ *Id.*

¹⁸ See *Public Notice, Parties are Invited to Comment on Supplemented Petitions For Eligible Telecommunications Carrier Designations*, CC Docket No. 96-45, DA 04-998 (rel. April 12, 2004).

¹⁹ *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) (“Until a regulatory body adopts the rules it has proposed in a rulemaking proceeding, its existing rules must govern the rights and obligations of those subject to its jurisdiction.... Under the Administrative Procedure Act and the relevant judicial decisions, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act.”)

the Bureau, made in accordance with the *Virginia Cellular* standard, that designating Nextel Partners as an ETC is in the public interest. Therefore, contrary to the assertion of the Rural LECs, the Commission has no legal basis to reverse the Bureau's designation of Nextel Partners as an ETC. The Bureau's Order must stand as mandated by existing precedent and policy established in *Virginia Cellular* for designating ETCs. The Commission cannot reverse a decision that is fully in accord with existing precedent, policy and rules, based on the *possibility* of future rule changes. This is particularly so when the existing precedent on which the decision is based already fully took into account the possibility of future rule change and struck a careful balance intended to allow the Commission to continue to make decisions of the very sort being challenged.

In applying the *Virginia Cellular* standards to the ETC petition of *Highland Cellular* in a decision that was released some two months *after* the adoption of the *Recommended Decision*, the Commission unequivocally affirmed its intent to move forward in reviewing all ETC petitions under the *Virginia Cellular* standard.²⁰ Indeed, in the *Recommended Decision*, the Joint Board acknowledged the potential for a change in ETC guidelines and specifically proposed that the Commission consider whether to grandfather existing ETC carriers or to allow carriers a reasonable transition period to bring operations into compliance with any new ETC requirements

²⁰ *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition For Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, Memorandum Opinion and Order, CC Docket No. 96-45, 19 FCC Rcd 6422 (2004) ("*Highland Cellular*"). In his separate statement to the *Highland Cellular* designation order, Commission Adelstein, after acknowledging issuance of the *Recommended Decision* stated, "I have been pleased to hear reports that state commissions and other parties are using the Virginia Cellular Order template in many state ETC proceedings." See *Highland Cellular*, Separate Statement of Commissioner Jonathan S. Adelstein.

that might be adopted.²¹ Thus, any relevant rule changes will be handled in the rulemaking proceeding and will be equally applicable to all ETCs at that time. The fact that the *Recommended Decision* has been issued or that comments have been filed in response provide no legitimate basis to undermine the ETC designation standards established in *Virginia Cellular*.

Nevertheless, the Rural LECs contend that due to “changed circumstances” resulting from the issuance of the Joint Board’s *Recommended Decision* and subsequent comments the Commission should stop applying the *Virginia Cellular* standard, should reverse the grant of ETC designation to Nextel Partners and should suspend consideration of *all* ETC petitions.²² This position proffered by the Rural LECs is unsupported by law and would create an untenable situation in which rural citizens would be denied the unique public interest benefits that the Bureau determined will be realized through designation of Nextel Partners as an ETC—a determination that, again, the Rural LECs have not even attempted to challenge. The Rural LECs ignore the Bureau’s determination of public interest benefit, and contend instead that the Commission’s public interest framework set forth in the *Virginia Cellular Order* does not go far enough because it does not present a resolution of *all* issues pertaining to the effect of additional competitive ETCs on the growth of the Universal Service Fund. Therefore, they contend that additional ETCs should not be designated “until the appropriate framework is established to evaluate the overall impact of such designations on the Fund.”²³

It is not clear whether or when the ongoing proceedings concerning the *Recommended Decision* cited by the Rural LECs as a basis for a moratorium on ETC designations, or any other

²¹ *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No.96-45, 19 FCC Rcd 4257, at ¶45 (2004) (*Recommended Decision*)

²² Application, at p.6.

²³ Application, at p.7.

rulemaking proceeding, will resolve *all* issues concerning future funding of the Universal Service Fund. Indeed, in its *Recommended Decision*, the Joint Board recommended that the Commission commence a second more comprehensive proceeding to consider the basis of universal service high-cost support for all carriers. In this proceeding (the *High-Cost Proceeding*), which began only recently,²⁴ the Joint Board and the Commission will undertake a further review of issues related to the growth and sustainability of the fund.

In removing these issues relating to the sustainability of the fund to a second proceeding, the Joint Board stated, “We do not believe that delaying our consideration of the basis of support will undermine the sustainability of the universal service fund.”²⁵ Notably, the Joint Board recognized that, “[b]ecause the Commission determined that the Rural Task Force plan (regarding cost methodologies) should remain in place until 2006” there is “adequate time to conduct a comprehensive proceeding on the basis of support.”²⁶ Thus, there is no legitimate reason for the Commission to reverse the carefully balanced approach adopted in *Virginia Cellular* for continued consideration of ETC petitions prior to final determinations in the ongoing Joint Board rulemaking proceedings.

It is the nature of administrative law and process that issues and policies concerning large support programs such as Universal Service arise on a continuing basis. An agency that declines to take any action under such a program until *all* possible issues have been resolved, despite having already enacted rules and policies to implement the program, risks frustrating the very goals underlying Congress’ creation of the program in the first place. In adopting the *Virginia*

²⁴ *Public Notice, Federal-State Joint Board On Universal Service Seeks Comment On Certain Rules relating to High-Cost Universal Service Support*, FCC 04J-2 (rel. August 16, 2004).

²⁵ *Recommended Decision*, at ¶ 97.

²⁶ *Id.*

Cellular standards for evaluation of pending ETC petitions, the Commission expressed its hope that the on-going Joint Board Proceeding “will provide a framework for assessing the overall impact of competitive ETC designations on the universal service mechanisms.”²⁷ But while recognizing this policy goal, the Commission adopted a framework so that it could fulfill its statutory mandate by continuing to review pending ETC petitions.²⁸ Thus, the Commission properly considered and rejected in the *Virginia Cellular* Order the “do-nothing-indefinitely” approach being proffered by the Rural LECs. In sum, the Application of the Rural LECs should be denied and the Bureau’s Order affirmed.

CONCLUSION

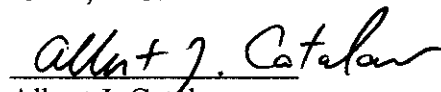
In view of the foregoing, the Commission should deny the Application For Review of the Rural LECs and affirm the Bureau’s Order designating Nextel Partners as an ETC.

Respectfully submitted,

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²⁷ *Virginia Cellular Order*, at ¶ 31.

²⁸ In the instant case, the Bureau found that designation of Nextel Partners “will not dramatically burden the universal service fund.” The Bureau concluded that “even assuming that Nextel captures each and every customer located in the affected study areas, the overall size of the high-cost support mechanisms would not significantly increase.” *Order*, at ¶ 21.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of October, 2004, copies of the foregoing Opposition to Applications for Review were sent by first-class U.S. Mail, postage prepaid, to each of the following:

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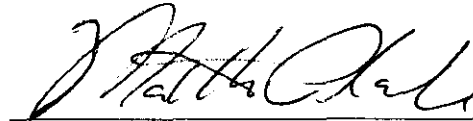
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